GAN KIM KIAT & BROTHERS REALTY SDN. BHD.

v.

LEANG AH KAN

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL APPEAL NO. 6 OF 1982]
10 FEBRUARY 1983

CIVIL PROCEDURE: *Appeal against order that action be reinstated - Proper order to be applied - Whether O. 28 r. 5 or O. 28 r. 7, Subordinate Courts Rules [1980] - No opportunity to be heard - Proper order in the absence of one party only.*

When an action came up for hearing before the learned Magistrate and only the defendants' solicitor and his clients were present, the Magistrate ordered the action by the plaintiff to be struck off. But the plaintiff's solicitor had earlier applied for a postponement by letter and on medical grounds had asked the Court to excuse his absence though not that of his client. The action was reinstated on application by the plaintiff's solicitor. The defendants appealed.

Held:

[1] From the grounds of judgment of the Magistrate, there was no doubt that the Magistrate had treated the matter on the basis of O. 28 r. 7 and not O. 28 r. 5.

[2] There was no merit in the complaint that the defendants were not given opportunity to be heard.

[3] Order 28 r. 5 did not apply as only one party to the action was absent and the proper order when the absence of the plaintiff's solicitor was not excused, was an order dismissing the plaintiff's claim with costs.

[4] The Magistrate was therefore in error in striking out the action when he ought to have adjourned the case to another date. As in a civil case a solicitor can be present without his client, it follows that when the absence of a solicitor in any case is excused and a postponement granted, the absence of the client too must be excused.

[5] The Magistrate was in error in treating the case on the basis that he had earlier dismissed the action in default of appearance and was reinstating it on being satisfied that due cause had been shown for the absence. He erred in holding that there was anything wrong in the first place. Furthermore, the Subordinate Courts Rules no longer require that good reason be shown for absence as a prerequisite to setting aside a judgment given or order made in default of appearance.

[Appeal dismissed.]

Legislation referred to:
Subordinate Courts Rules 1980, O. 28 rr. 5, 5(1), 7

For the appellants - F.H. D'Cruz; M/s. Tay Leong Siak & Co.
For the respondent - Selvarajah; M/s. Selvarajah & Nirmala

JUDGMENT

Peh Swee Chin J:

In my view, this appeal is the result of a great deal of confusion on the part of all parties arising out of a few points of practice and procedure.

The following facts cannot be disputed or appear to be not in dispute. On 7 May 1982, Tampin Magistrate's Court Civil Action No. 43 of 1981 came up for hearing before the learned Magistrate. The defendants' solicitor and his clients were present while the plaintiff's solicitor and his client were absent. The learned Magistrate ordered that the action by the plaintiff be **struck off.** (the emphasis is mine).

It transpired, that prior to the above episode, the solicitor for the plaintiff had applied for a postponement by letter on medical grounds, asking the Court to excuse his absence later, **but not** the absence of his client. (The emphasis is mine again). Having been so advised, the learned Magistrate felt, no doubt, he was entitled to strike out the case.

The solicitor for the plaintiff duly applied to the learned Magistrate for the reinstatement of the above case. In his affidavit filed in support, he stated that the plaintiff's absence in Court on 7 May 1982 was due to his mistake in advising the plaintiff that the latter need not be present in Court on 7 May 1982. The learned Magistrate then made the order reinstating the case for hearing on 19 July 1982. From this order made on 19 July 1982, the defendants have now appealed.

Learned Counsel for the defendants/appellants argued before me that the learned Magistrate was wrong in relying on O. 28 r. 5 of the Subordinate Courts Rules 1980, whereas he should have relied on O. 28 r. 7. O. 28 r. 5(1) states -

> if, when an action is called on for hearing, neither party appears, the action may be struck out, without prejudice, however, to the restoration thereof, on the direction of the Judge.

Order 28 r. 7 on the other hand reads -

> If, when an action is called on for hearing the defendant appears but the plaintiff does not appear the Court may:
>
> (a) if the defendant has no counterclaim, dismiss the action with costs;
>
> (b) if the defendant has a counterclaim, give judgment for the defendant on his counterclaim; and
>
> make any other order as it thinks just.

I agree with learned Counsel that O. 28 r. 7 should have applied, but from the grounds of judgment of the learned Magistrate, there can be no doubt that he had treated the matter on the basis of O. 28 r. 7, and therefore, in substance, the complaint of learned Counsel would appear to be of no avail to him. I will deal more with this later.

Learned Counsel for the defendants/appellants argued further that the defendants' solicitor was given no opportunity of being heard, a very serious complaint indeed from its very nature. However, what actually happened does not bear it out at all. The defendants/appellants, in fact, were served with the copy of the application for "reinstatement", and the copy and the facts of its service were duly brought to the attention of solicitor for the defendants/appellants. The solicitor then asked his clients (as was ascertained from both Counsel at the Bar table) to appear in Court on 19 July 1982 to ask for an adjournment as he was not free. The notes of evidence do not however mention any application for postponement by defendants' solicitor.

The first point is as to what happens when a case is called up when certain parties are absent. Order 28 r. 5(1) applies when both parties to the case, are absent, and the Court has a discretion to strike out the case, without prejudice to its restoration. When a case is so struck out, then, it does not involve, in my view, a judgment in default for a plaintiff, nor an order dismissing the claim with costs of the plaintiff in favour of a defendant. It means that the case is struck out of the list of hearing for that day. What then is required to be done by restoration, commonly referred to in practice as reinstatement? Surprisingly enough, there is a dearth of authority on this, but in my view, any request or application for restoration should normally be granted readily by the Court unless the absence of the plaintiff was either intentional or contumacious.

Order 28 r. 5 mentioned above would not apply to facts of the instant matter for the solicitor for defendants/appellants and his clients were present on 7 May 1982 while the plaintiff and his solicitor were absent. The proper order in this case, on 7 May 1982, apart from an adjournment, should have been, when the absence of solicitor was not excused or not previously excused, an order dismissing the plaintiff's claim with costs.

The second point I wish to stress is that in a civil case, unlike a criminal case, a litigant can always be represented by his solicitor who is a duly authorised agent for a plaintiff or a defendant. Such being the case, that when a civil case, it follows, comes up for hearing as fixed, the solicitor can be present without his client. If the solicitor is present, and his client is absent, then no Court can give judgment (e.g. for a liquidated demand) in default of appearance, when the solicitor's client is defendant or dismiss the claim with costs when the solicitor's client is plaintiff. If the Court orders the case to proceed to trial, when a solicitor is present but without his client, then it merely means, in practical terms, that the said solicitor is deprived of a possibly most important and material witness. It follows that, when the absence of a solicitor in any case is excused and a postponement is granted, a Court must also excuse the absence of his client.

Having regard to what is stated above, the solicitor for the plaintiff/respondent was in error when, requesting for a postponement, he asked the learned Magistrate to excuse his absence, but not the absence of his client, he thereby unwittingly, misled the learned Magistrate into making the order of striking out the case in the first place.

The learned Magistrate was in error when in approving the application by plaintiff's solicitor for postponement of the case he struck out the case at the same time for, he should have adjourned the case to another date, and disregarded the absence of the plaintiff/respondent. If he had refused a request for adjournment, (which he did not), then he should have dismissed the action with costs instead of striking out the action.

The learned Magistrate had treated the case on the basis that he had dismissed the claim of the plaintiff/respondent in default of appearance, for in his grounds, he stated that he was satisfied with the due cause shown for absence and the good cause of action of the plaintiff. I cannot find anything wrong with the basis or materials before him for him to be so satisfied, subject to what I have to say in a moment.

Under the Subordinate Courts Rules, 1980, the procedure and practice of applying to set aside a judgment in default of appearance in the Subordinate Courts have been brought in line with those in the High Court so that the requirement of "good reason for absence be shown" mentioned in the repealed Subordinate Courts Rules, 1950, is no longer insisted on as a prerequisite, together with the usual affidavit of merits in an application to set aside judgment or order made in default of appearance.

In the circumstances of this case, I therefore dismiss the appeal with no order as to costs in this appeal but that the plaintiff/respondent shall pay all the costs thrown away on 7 May 1982 and all costs of application for "reinstatement" dated 28 June 1982. I further direct that Tampin Magistrate's Court Civil Action No. 43 of 1981 be fixed for hearing early.

Also found at [1983] 1 CLJ 298